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The Supreme Court of the United States

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United States

OCTOBER TERM, A. D. 1943

No. 743

M. P. DEPAOLI and LENA DEPAOLI,
his wife,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
the Ninth Circuit

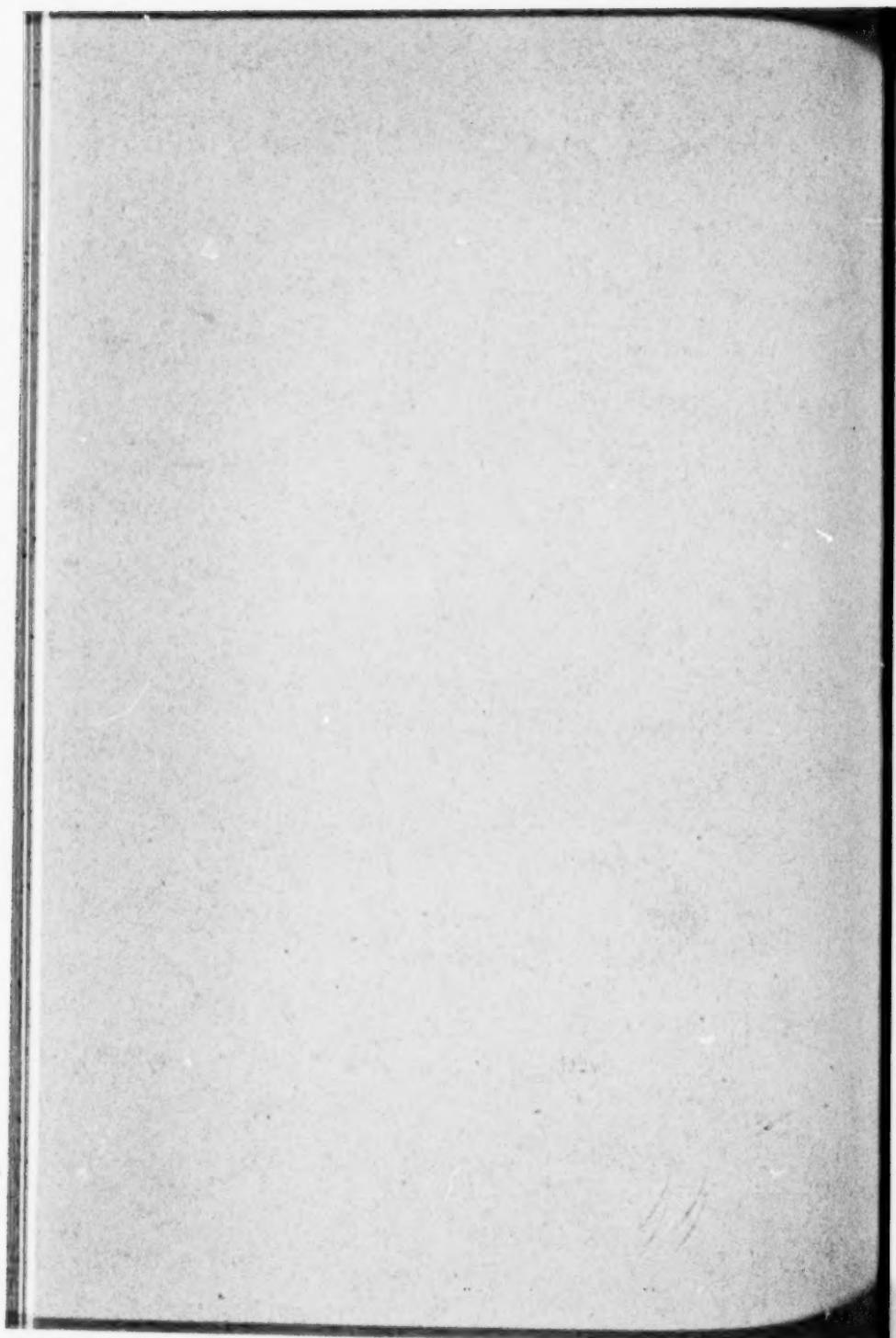
and

BRIEF IN SUPPORT THEREOF

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SIDNEY W. ROBINSON
Of Counsel.



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**PETITION FOR WRIT OF CERTIORARI
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To The Honorable the Chief Justice and
Associate Justices of the Supreme Court
of the United States:

**SUMMARY STATEMENT OF MATTER
INVOLVED**

This action was filed in the District Court of the
United States for the District of Nevada on the 4th
day of February, 1938, for the recovery of the posses-
sion of certain real property situated, located and being

in Washoe County, Nevada, said real property being more particularly described as follows, to-wit:

Township 21 north, range 24 east, M. D. M. Nevada, Section 22, Lots 7 and 8; Section 27, Lots 1, 2, 3, 6, 7, 10, 11, 12, 13 and 14 containing 415.35 acres (R. 2).

For approximately seventy-seven years prior to the institution of this action and since the year 1861, the above-described real property has been in the exclusive and undivided possession of petitioners and their grantors and predecessors in interest (R. 232); that during said period of time and since the year 1861, petitioners, their grantors and immediate predecessors in interest in the occupation of said real property have tilled, cultivated and irrigated the same and have broken and cleared the same from uncultivated, raw land; that during said period of time said petitioners, their grantors and predecessors in interest have improved the same for farming purposes and have constructed buildings, fences, ditches and dams thereon and used in connection therewith; that crops have been produced thereon by said petitioners, their grantors and predecessors in interest each and every year since the year 1864 (R. 232); that in connection therewith said petitioners, their grantors and predecessors in interest have been granted by judicial determination various water rights predicated upon the real property in question, which said water rights have been recognized by the United States District Court for the District of Nevada in an action wherein respondent herein was a party litigant (R. 241); that said real property forming the subject matter of this action is adjacent to patented land owned

by petitioners in fee simple, which said patented land, together with the land forming the subject matter of this action has been operated for many years last past as a single ranching unit (R. 237).

That at the time said real property forming the subject matter of this action was settled upon and in the year 1861 the public surveys had not been extended to include said lands and the same were open and unsurveyed (R. 232); that subsequent to the settlement of the real property in question and on March 23, 1874, by executive order there was established what is known as the Pyramid Lake Indian Reservation (R. 236); that prior to the establishment of said Pyramid Lake Indian Reservation and in the year 1865 the exterior boundaries thereof were established by survey, which survey included the real property herein referred to; that thereafter and on May 13, 1865, the Department of the Interior directed that the southerly boundary of said reservation as so surveyed be moved to a point ten miles north of that fixed by said survey so as to exclude the real property herein referred to (R. 236); subsequently and on August 17, 1865, said order was revoked; that notwithstanding the fact that the real property in question is included within the exterior boundaries of said Pyramid Lake Indian Reservation, the same has never been occupied, used or improved by the Piute Indians, for whom said reservation was created, which said Indians have never been in possession of the same (R. 237); that said real property is about twenty miles distant from the nearest portion of said reservation occupied by said Indians (R. 238).

That no effort was made to remove petitioners or their predecessors in interest from said **real property** prior to the year 1909; that in the year 1916 actions for ejection were instituted in the District Court of the United States for the District of Nevada against petitioners herein, which said actions were postponed at the request of the Department of the Interior; that thereafter and on June 7, 1924, the Congress of the United States passed an act entitled "An Act for the Relief of Settlers and Townsite Occupants of Certain Lands in the Pyramid Lake Indian Reservation, Nevada," being Chapter 311, Public Laws of the United States (43 Stats. 596, Chapter 311); that a copy of said act is appended hereto and forms Appendix A attached to petitioners' brief in support of this petition; that said act was designed not only for the relief of petitioners herein, but also for the relief of various other white settlers similarly situated (R. 237).

That said act of June 7, 1924, provided, among other things, as follows: It authorized the Secretary of the Interior "to sell to settlers or their transferees ***. All sales *** shall be made through the local Land Office within ninety days after the price of the land shall have been fixed ***. Provided further, that said sales shall be by private cash entry ***. Provided that where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation" (R. 226).

That thereafter and in March of 1925 the Secretary of the Interior promulgated certain regulations regard-

ing the "terms, conditions, and price per acre" and the time of payment therefor. Said regulations were modified from time to time over a period of years, which said modifications variously reduced the price per acre and changed the time and manner of payment (R. 226).

That on March 3, 1925, M. P. Depaoli, one of the petitioners herein, as a qualified applicant under said act and pursuant to said act made application to the Department of the Interior to purchase the real property herein referred to; that in June of 1925 said applicant made a quarter-payment of \$2,514.82 on the total appraised price of the real property covered by said application in the total sum of \$6,068.03; that on September 16, 1925, the General Land Office allowed said application and retained said initial quarter-payment (R. 239); that thereafter, by reason of economic conditions and the pendency of proposed legislation to reduce the purchase price of the real property in question, no additional payments were made by said applicant and the General Land Office allowed the matter to remain in status quo; that various arrangements for payment and notices to pay were respectively made and given over a period of years until March 10, 1936, at which time the General Land Office notified said applicant that the Secretary of the Interior had ruled that all interest due on the unpaid principal was required to be paid within thirty days and that one-third of the remaining principal was required to be paid within six months and that failing this the application would be cancelled without further notice (R. 240).

That said applicant failed to pay the interest as re-

quired and on May 13, 1936, the Secretary of the Interior ordered the cancellation of the application; that thereafter and on August 11, 1936, said applicant, M. P. Depaoli, paid the full balance of the purchase price and interest to the Register of the United States Land Office at Carson City, Nevada, which said final payment and interest totaling \$5,116.62 was duly and regularly forwarded to the United States Land Office at Washington, D. C., and duly and regularly deposited with the Treasurer of the United States; that said final payment was received and accepted by the Register and Receiver of the Carson City Land Office in Carson City, Nevada, and by the General Land Office at Washington, D. C., and reported and deposited with the United States Treasury by the Department of the Interior; that said money was retained by respondent herein for two years and eight months without question; that more than one year and two months after the filing of this action, to-wit, on April 17, 1939, the return of said final payment was tendered to said M. P. Depaoli, which tender was refused and said payment returned to the Federal Reserve Bank at San Francisco, California, from whence the same had been sent (R. 227, 243); that no tender or offer to return the initial payment of \$2,514.82 has ever been made by respondent to petitioners; that said respondent still has in its possession the full purchase price of said real property, together with interest thereon totaling the sum of \$7,631.44 (R. 243).

Upon the basis of the foregoing facts, the District Court of the United States for the District of Nevada,

in which court the above-entitled matter was tried, determined that an entry was made upon the real property in question by M. P. Depaoli, one of the petitioners herein, and that as a result of said entry a contract arose as between said M. P. Depaoli and respondent herein, which said contract created the relationship of vendor and vendee as between the parties thereto. The said trial court further determined that said contract was not subject to forfeiture under the circumstances herein presented and that the same could only be terminated pursuant to general equitable principles governing suits for cancellation of a conveyance or the rescission of a contract (R. 246).

Upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, said Court reversed the judgment of the District Court of the United States for the District of Nevada and determined the foregoing legal principles adversely to petitioners herein upon the basis of the decision in the case of *United States of America vs. Garaventa Land and Livestock Co.* (Appendix B) in which said last-named case Circuit Judge Healy dissented.

BASIS OF JURISDICTION OF UNITED STATES SUPREME COURT

The jurisdiction of the United States Supreme Court is invoked under Section 240A of the Judicial Code as amended, 28 U. S. C. A. 347, and under the act of June 7, 1924, Chapter 311, 43 Stat. 596, 25 U. S. C. A., Section 421 (note).

The judgment sought to be reviewed was entered

by the United States Circuit Court of Appeals for the Ninth Circuit on the 9th day of December, 1943. Said judgment of said Circuit Court of Appeals is to be found in 139 Fed. (2nd) 225. Said judgment of said Circuit Court of Appeals reversed a judgment of the United States District Court for the District of Nevada entered by said District Court on the 11th day of February, 1943, which said last-named judgment of said District Court is to be found in 47 Fed. Supp. 688 (R. 247).

QUESTIONS PRESENTED

The following questions are presented for consideration upon this petition for writ of certiorari:

First: Whether or not an "entry" upon the real property in question was made by M. P. Depaoli, one of the petitioners herein, under the terms and provisions of the act of June 7, 1924, herein referred to, by the application to purchase made by him, the payment by him of the initial installment upon the purchase price and the allowance of said application by the General Land Office.

Second: Whether or not the "entry" made by said M. P. Depaoli, one of the petitioners herein, in the manner hereinabove set forth in the Summary Statement of Matter Involved created a property right.

Third: Whether or not the property right created by the "entry" under consideration is such a property right as to be entitled to the protection of the provisions of the Fifth Amendment to the Constitution of the United States of America.

Fourth: Whether or not a contract creating a vendor and vendee relationship between respondent and M. P. Depaoli, one of the petitioners herein, arose as a result of the making of the "entry" herein referred to.

Fifth: Whether or not respondent herein in seeking to cancel petitioner's contract of purchase is not bound by general principles of equity ordinarily governing the cancellation of a conveyance or rescission of a contract.

Sixth: Whether or not under the Act of June 7, 1924, Chapter 311, 43 Stat. 596, 225 U. S. C. A., Section 421 (note), the Secretary of the Interior has the authority to arbitrarily declare a forfeiture of petitioners' rights in the real property in question after having originally promulgated rules and regulations under said act, none of which contain provision for forfeiture.

REASONS RELIED ON FOR THE ALLOW- ANCE OF THE WRIT

The decision of the Circuit Court of Appeals sought to be reviewed hereby is erroneous and in conflict with the principles of applicable decisions of this Court.

To the extent that said decision determines that petitioners have acquired no equitable interest or property rights in the real property in question, said decision is in conflict with the decisions of this Court in the following cases, among others: *Chotard vs. Pope*, 12 Wheat. (U. S.) 586; *McMichael vs. Murphy*, 197 U. S. 304; *Sturr vs. Beck*, 133 U. S. 541; *Whitney vs. Taylor*, 158 U. S. 85; *Witherspoon vs. Duncan*, 71 U. S. 210 (4 Wall. 210); *The Hastings & Dakota Railroad Company vs. Whitney*, 132 U. S. 357; and is in conflict with the deci-

sions of other Circuit Courts of Appeals on the same matter in the following cases, among others: *Denny vs. Dodson*, 32 Fed. 899; *U. S. vs. Northern Pac. Ry. Co.*, 204 Fed. 485; and *McCune vs. Essig*, 118 Fed. 273.

To the extent that said decision determines that no contract exists as between the parties hereto, the cancellation of which is subject to general principles of equity governing the cancellation of conveyances or the rescission of contracts, said decision is in conflict with the decisions of this Court in the following cases, among others: *Pan American Petroleum Company vs. United States*, 273 U. S. 456, 506; *U. S. vs. Detroit Lumber Company*, 200 U. S. 321, 339; *United States vs. Stinson*, 197 U. S. 200, 204; and *Reading Steel Casting Company vs. United States*, 268 U. S. 186.

In this connection it will be noted that Circuit Judge Healy in his dissenting opinion in the case of *United States vs. Garaventa Land and Livestock Company*, 129 Fed. 2d 416, upon which the decision of the Circuit Court of Appeals in this case is predicated, states as follows:

"Equitable principles will not, of course, be applied to frustrate the purpose of a law of the United States or to circumvent public policy. *Pan American Company v. United States*, 273 U. S. 456, 506; *Causey v. United States*, 240 U. S. 399, 402; *Heckman v. United States*, 224 U. S. 413, 446; *United States v. Trinidad Coal Company*, 137 U. S. 160, 170. But it is well settled that general principles of equity will ordinarily govern in suits by the United States to secure the cancellation of a conveyance or the rescission of a contract. *Pan American Company v. United States*, *supra*, p. 506;

United States v. Detroit Lumber Company, 200 U. S. 321, 339; United States v. Stinson, 197, U. S. 200, 204."

To the extent that said decision determines that a forfeiture may be declared of petitioners' rights in the real property in question, said decision is in conflict with applicable local decisions, among others, as follows: *Mosso vs. Lee*, 53 Nev. 175; 295 Pae. 776; *Clark vs. Loudon Assur. Cor.*, 44 Nev. 359; 195 Pae. 809; *Lake vs. Lewis*, 16 Nev. 94; *Bishop vs. Stewart*, 13 Nev. 25; *Irvine vs. Hawkins*, 20 Nev. 384; *First Federal Trust Co. vs. First National Bank*, 295 Fed. 353 at 357 (C. C. A. 9, from Nevada); said decision is further in conflict with general equitable principles, see Pomeroy's Equity Jurisprudence (5th Edition), Vol. 2, Section 445, page 301, et seq., and also said decision is in conflict with the Fifth Amendment to the Constitution of the United States of America since to so hold amounts to a deprivation of property without due process of law; see *Walker vs. McCloud*, 204 U. S. 302; and is also in conflict with the decisions of other Circuit Courts of Appeals on the same matter in the following case, among others, *United States Harness Company vs. Graham*, 288 Fed. 929.

In this connection it will be noted that Circuit Judge Healy in his dissenting opinion in the aforesaid case of *United States vs. Garaventa Land and Livestock Company*, *supra*, states:

"On these facts it is conceded that as between an ordinary vendor and vendee a forfeiture would not be decreed in equity. *Mosso v. Lee*, 53 Nev. 176, 295 Pae. 776; Pomeroy's Equity Jurisprudence (5th

Ed.), Vol. 2, [445, p. 301 et seq. The naked circumstance that the United States is the vendor is not an adequate reason for proceeding otherwise.

"I am not able to see how the denial of the forfeiture in the circumstances here would tend to frustrate the policy of the law. The very purpose of the special act was to make it possible for appellees and others in like situation to acquire title to the lands which they and their predecessors had improved and had so long occupied. Acceptance of the tendered balance with accrued interest in full will make the vendor whole; and it is not claimed that the Government would suffer prejudice in such event because of the default on the basis of which the forfeiture was declared."

In the interest of brevity (Rule 38, par. 2) *Furness, Withy & Co. Ltd. v. Yang-Tsze Ins. Asso. Ltd.*, 242 U. S. 430) petitioners do not at this time set forth all of the points which will be urged upon argument on the merits of this cause should the writ be granted, nor all of the contentions in support of such points.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and proceedings of said United States Circuit Court of Appeals for the Ninth Circuit in that certain case numbered on its docket No. 10418, United States of America, Appellant, vs. M. P. Depaoli and Lena Depaoli, his wife, Appellees, and that the judgment herein of the United States Circuit Court of Appeals

for the Ninth Circuit be reversed by this honorable Court and that your petitioners have such other and further relief in the premises as to this honorable Court may seem meet and just.

WILLIAM M. KEARNEY,
Counsel for Petitioners.

SIDNEY W. ROBINSON,
Of Counsel for Petitioners.